Public Prosecutor v Reza Mohd Shah bin Ahmad Shah

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–40 OF 2005(W)
ZAKI AZMI CHIEF JUSTICE, ABDUL AZIZ MOHAMAD AND HASHIM YUSOFF FCJJ
16 JANUARY 2009

Criminal Law — Dangerous Drugs Act (Malaysia) — s 37(d) — Trafficking — Presumption under s 37(d) of the Dangerous Drugs Act 1952 — Whether inference drawn from direct evidence sufficient to show possession — Whether knowledge proved

Words and Phrases — 'Nature' — Whether 'nature' in s 37(d) of the Dangerous Drugs Act 1952 required prosecution to prove respondent knew name or type of dangerous drug concerned — Dangerous Drugs Act 1952 s 37(d)

The accused/respondent was carrying in his right hand a plastic bag when he was apprehended by a Police Inspector. However, when the Police Inspector who was dressed in plain clothes shouted 'police', the respondent immediately started running and threw away the plastic bag that he was carrying. Upon recovery, the said plastic bag was found to contain 795.3g of cannabis, the dangerous drug. The respondent was thereafter charged with the offence of trafficking in 795.3g of cannabis. At the trial the prosecution relied on the evidence of actual knowledge to prove the element of knowledge that is necessary for possession in criminal law and did not choose to rely on the presumption of knowledge in s 37(d) of the Dangerous Drugs Act 1952 ('the Act'). The respondent's defence was in the nature of a bare denial. At the close of the trial, the respondent was convicted and sentenced to death by the High Court for the offence of trafficking. In his judgment the trial judge stated that the fact that the respondent was carrying the plastic bag with its contents followed by the speed at which he ran and threw it upon being confronted showed that there was a clear nexus between his conduct and the offence in question ie that he wanted to part possession with what constituted the offence. The trial judge therefore concluded that the inferences drawn from the direct evidence were sufficient to show that the accused had possession of the cannabis and since he failed to rebut the statutory presumption of trafficking under s 37(da) the prosecution had proved its case beyond reasonable doubt. The respondent appealed to the Court of Appeal, which took the view that the prosecution had to prove knowledge of the particular

drug in question, which in this case was cannabis, and that just because the respondent took flight and threw the plastic bag containing the dangerous drugs did not point to the one and only conclusion that he knew that what he was carrying was the dangerous drug, cannabis. Based on this the Court of Appeal found that the prosecution had failed to prove actual knowledge but the court had recourse to the presumption of knowledge in s 37(d) and found the respondent guilty of possession under s 6 of the Act. This was the prosecution's appeal against that decision by the Court of Appeal. This appeal revolved on the issue as to whether the respondent, without the aid of the statutory presumption under s 37(d) of the Act of 'deemed possession' had knowledge of the nature of the dangerous drugs.

Held, allowing the appeal and restoring the conviction and sentence imposed by the High Court:

(1) (per **Abdul Aziz Mohamad FCJ**) There were two aspects to the judgment of the Court of Appeal as regards to knowledge. The first aspect was that it must be knowledge of the particular drug in question, in this case cannabis; while the second aspect was that other inferences could be drawn from the respondent's act of running from the police and throwing away the plastic bag of cannabis such that he knew he was carrying some other prohibited goods or that he became panicky when confronted by men not in police uniform. The second aspect could be disposed by the fact that in the absence of any indication to the contrary, the inference must be that he knew he was in fact carrying, namely a prohibited drug. In addition, if he knew that they were say robbers pretending to be police officers in order to rob him he would have fled without throwing the plastic bag (see paras 8–9).

(2) (per **Abdul Aziz Mohamad FCJ**) When the trial judge said that the prosecution did not have to prove that the respondent had knowledge of the 'nature' of the drugs, he meant that the prosecution did not have to prove knowledge of the 'nature' of the drugs as dangerous drugs. He meant that the respondent knew that there were dangerous drugs in the plastic bag and that because of this knowledge the respondent had a guilty mind. Therefore, according to the trial judge, for the prosecution to prove that the respondent was in possession of cannabis the prosecution needed to only prove, as regards knowledge, that the respondent had knowledge that what he was carrying were dangerous drugs. Thus, once knowledge that the thing carried was dangerous drugs was proved, possession of the particular drug, ie cannabis, was proved (see paras 11–12).

(3) (per **Abdul Aziz Mohamad FCJ**) Where possession of a dangerous drug is concerned, to prove the element of guilty knowledge or mens rea

the prosecution need only prove that the accused knew the nature of the particular dangerous drug that he was in possession of as a dangerous or prohibited drug. The prosecution need not also prove knowledge as to the name, type or exact qualities of the dangerous drug. This is a fair and just construction of what is meant by knowledge of the nature of the thing possessed and the Court of Appeal erred in holding that the prosecution had to prove that the respondent knew that what he was carrying was actually cannabis (see paras 14, 21–22).

(4) (per **Hashim Yusoff FCJ**) The Court of Appeal erred in its finding that on the facts of this case it could not be inferred that the respondent did have the knowledge that what he possessed was the dangerous drug, cannabis. The trial judge had correctly inferred that the respondent, by his act of running away from the police and throwing away the plastic bag, had showed that he knew the nature of the contents of the said plastic bag to be cannabis. The trial judge had also appropriately considered the defence advanced by the respondent and gave his reasons why he rejected it (see paras 31, 34–35).

[Bahasa Malaysia summary

Tertuduh/responden sedang membawa di tangan kanannya satu beg plastik ketika diberkas oleh seorang Inspektor Polis. Tetapi, apabila Inspektor Polis yang berpakaian preman menjerit 'polis', responden dengan segera melarikan diri dan membuang beg plastik yang sedang dibawanya. Apabila ditemui, beg plastik tersebut didapati mengandungi 395.3g kanabis, dadah berbahaya. Responden kemudiannya didakwa atas kesalahan mengedar 795.3g kanabis. Ketika perbicaraan pihak pendakwaan bergantung kepada keterangan pengetahuan sebenar untuk membuktikan elemen pengetahuan yang mana adalah penting bagi milikan di dalam undang-undang jenayah dan tidak memilih untuk bergantung kepada anggapan pengetahuan di dalam s 37(d) Akta Dadah Berbahaya 1952 ('Akta'). Pembelaan responden adalah bersifat penafian kosong. Di akhir perbicaraan, responden telah disabitkan dan dihukum mati oleh Mahkamah Tinggi atas kesalahan mengedar. Di dalam penghakimannya, hakim bicara menyatakan bahawa fakta bahawa responden membawa beg plastik bersama dengan kandungannya diikuti dengan kepantasan ketika dia berlari dan membuangnya apabila didatangi menunjukkan bahawa terdapat hubungan di antara tindakannya dan kesalahan yang dipersoalkan iaitu bahawa dia hendak melepaskan diri daripada barang yang membentuk kesalahan tersebut. Hakim bicara oleh itu memutuskan bahawa inferens yang dibuat daripada keterangan terus adalah cukup untuk membuktikan bahawa tertuduh mempunyai milikan kanabis dan oleh kerana responden telah gagal untuk mematahkan anggapan statutori mengedar di bawah s 37(da), pihak pendakwaan telah membuktikan kesnya melangkaui batas keraguan yang munasabah. Responden merayu kepada

A Mahkamah Rayuan, yang berpandangan bahawa pihak pendakwan perlu membuktikan pengetahuan terhadap butiran dadah yang dipersoalkan, yang mana di dalam kes ini adalah kanabis, dan hanya kerana responden melarikan diri dan membuang beg plastik yang mengandungi dadah berbahaya tidak menunjukkan satu-satunya kesimpulan bahawa responden mengetahui B bahawa apa yang dibawanya adalah dadah berbahaya, kanabis. Berdasarkan perkara ini Mahkamah Rayuan mendapati bahawa pihak pendakwaan telah gagal untuk membuktikan pengetahuan sebenar tetapi mahkamah telah menggunakan anggapan pengetahuan di dalam s 37(da) dan mendapati responden bersalah atas milikan di bawah s 6 Akta. Ini adalah rayuan pihak C pendakwaan terhadap keputusan Mahkamah Rayuan. Rayuan ini berkisarkan atas isu sama ada responden, tanpa bantuan anggapan statutori di bawah s 37(d) Akta 'dianggap memiliki' mempunyai pengetahuan mengenai sifat dadah berbahaya tersebut.

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Diputuskan, membenarkan rayuan dan mengekalkan sabitan dan hukuman yang dikenakan oleh Mahkamah Tinggi:

E (1) (oleh **Abdul Aziz Mohamad HMP**) Terdapat dua aspek penghakiman Mahkamah Rayuan berkenaan dengan pengetahuan. Aspek pertama adalah ianya mestilah pengetahuan butiran mengenai dadah yang dipersoalkan, dalam kes ini adalah kanabis; sementara itu aspek kedua adalah inferens lain yang boleh dilihat daripada tindakan responden F yang lari daripada polis dan membuang beg plastik kanabis dengan itu responden tahu yang dia membawa barang larangan yang lain atau dia menjadi panik apabila didatangi oleh lelaki yang tidak memakai pakaian seragam polis. Aspek kedua boleh ditentukan dengan fakta bahawa dalam ketiadaan mana-mana petunjuk kepada yang bertentangan, inferens mestilah bahawa responden tahu bahawa dia G sebenarnya membawa, dadah berbahaya. Selanjutnya, jika responden mengetahui bahawa mereka adalah perompak yang menyamar sebagai pegawai polis yang ingin merompaknya responden seharusnya melarikan diri tanpa membuang beg plastik tersebut (lihat perenggan 8–9).

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(2) (oleh **Abdul Aziz Mohamad HMP**) Apabila hakim bicara menyatakan bahawa pihak pendakwaan tidak mempunyai bukti bahawa responden mempunyai pengetahuan mengenai 'sifat' dadah, maksud beliau bahawa pihak pendakwaan tidak perlu membuktikan pengetahuan I berkenaan dengan 'sifat' dadah sebagai dadah berbahaya. Beliau maksudkan bahawa responden mengetahui bahawa terdapat dadah berbahaya di dalam beg plastik dan disebabkan pengetahuan ini responden mempunyai minda bersalah. Oleh itu, menurut hakim bicara, bagi pihak pendakwaan untuk membuktikan bahawa responden

adalah dalam milikan kanabis pihak pendakwaan hanya perlu membuktikan, berkenaan dengan pengetahuan, bahawa responden mempunyai pengetahuan bahawa apa yang dibawanya adalah dadah berbahaya. Oleh itu, apabila pengetahuan bahawa barangan yang dibawa adalah dadah berbahaya telah dibuktikan, milikan dadah tertentu tersebut, iaitu kanabis telah dibuktikan (lihat perenggan 11–12)

(3) (oleh **Abdul Aziz Mohamad HMP**) Di mana berkenaan dengan milikan dadah, untuk membuktikan elemen pengetahuan bersalah atau mens rea, pihak pendakwaan hanya perlu membuktikan bahawa tertuduh mengetahui sifat tertentu dadah berbahaya tersebut bahawa tertuduh adalah dalam milikan dadah berbahaya atau dadah yang diharamkan. Pihak pendakwaan juga tidak perlu membuktikan pengetahuan berkenaan dengan nama, jenis atau kualiti sebenar dadah berbahaya. Ini adalah pentafsiran yang adil dan saksama berkenaan dengan maksud pengetahuan sifat barangan yang dimiliki dan Mahkamah Rayuan telah terkhilaf dalam memutuskan bahawa pihak pendakwaan perlu membuktikan bahawa responden tahu bahawa apa yang dibawanya adalah kanabis (lihat perenggan 14, 21–22).

(4) (oleh **Hashim Yusoff HMP**) Mahkamah Rayuan telah terkhilaf di dalam keputusannya bahawa atas fakta kes ini ianya tidak boleh disimpulkan bahawa responden mempunyai pengetahuan bahawa apa yang dimilikinya adalah dadah berbahaya iaitu kanabis. Hakim bicara membuat kesimpulan yang betul bahawa responden, dengan tindakannya melarikan diri daripada polis dan membuang beg plastik telah menunjukkan bahawa dia mengetahui sifat kandungan beg plastik tersebut adalah kanabis. Hakim bicara juga dengan sewajarnya mempertimbangkan pembelaan yang dikemukakan oleh responden dan memberikan alasan mengapa beliau menolaknya (lihat perenggan 31, 34–35).]

Notes

For cases on s 37(d) of the Dangerous Drugs Act, see 4 *Mallal's Digest* (4th Ed, 2005 Reissue) paras 187–193.

Cases referred to

Abdullah Zawawi bin Yusof v PP [1993] 3 MLJ 1, SC (distd)
Chan Pean Leon v PP [1956] MLJ 237, HC (refd)
Director of Public Prosecutions v Brooks (Wishart) [1974] AC 862, PC (refd)
Leow Nghee Lim v Reg [1956] MLJ 28, HC (folld)
Muhammed bin Hassan v PP [1998] 2 MLJ 273, FC (refd)
Neo Koon Cheo v R [1959] MLJ 47, HC (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19, FC (refd)
PP v Mohd Farid bin Mohd Sukis & Anor [2002] 3 MLJ 401, HC (refd)

A *PP v Phua Keng Tong* [1986] 2 MLJ 279, HC (refd)
PP v Reza Mohd Shah bin Ahmad Shah [2002] 4 MLJ 13, HC (refd)
Reza Mohd Shah bin Ahmad Shah v PP [2006] 2 MLJ 223; [2005] 4 CLJ 581, CA (refd)
Sim Teck Ho v PP [2000] 4 SLR 39, CA (refd)
B *Taib bin Mohamad v PP* [2002] 3 MLJ 476, CA (refd)
Tan Teck Chew v PP [2002] 2 MLJ 321, CA (refd)
Toh Ah Loh and Mak Thim v Rex [1949] MLJ 54, CA (refd)
Toh Su Kuan v PP [2005] 3 CLJ 740, CA (not folld)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356; [1969] 2 AC
C 256, HL (refd)

Legislation referred to
Dangerous Drugs Act 1952 ss 6, 37(d), (da), 39A(2), B(2)
Drugs (Prevention of Misuse) Act 1964 [UK]

D

Appeal from: Criminal Appeal No W-05–34 of 2002 (Court of Appeal, Putrajaya)

Nurulhuda Nuraini bt Mohd Noor (Deputy Public Prosecutor, Attorney General's
E *Chambers) for the appellant.*
Edward Boon Tai Soon (Nik Mohamed Ikhwan with him) (Chooi & Co) for the respondent.

Abdul Aziz Mohamad FCJ:

F

[1] In the High Court, the prosecution relied on evidence of actual knowledge to prove the element of knowledge that is necessary for possession in criminal law. The evidence relied on was that of the respondent, upon
G being aware of police presence, when their leader shouted 'Police!', immediately running away and throwing the plastic bag containing two packages of cannabis that he was carrying. The prosecution did not choose to rely on the presumption of knowledge in s 37(d) of the Dangerous Drugs Act 1952 ('the Act'). That was because if they did, then, by reason of this court's
H decision in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273, they would not have been able to rely also on the presumption of trafficking in s 37(da), arising from possession of the requisite amount of drug.

[2] The presumption of knowledge in s 37(d) is in the following terms:
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> (d) any person who is found to have had in his custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of such drug and shall, until the contrary is proved, be deemed to have known the nature of such drug.

[3] The judgment of the High Court is reported as *Public Prosecutor v Reza Mohd Shah bin Ahmad Shah* [2002] 4 MLJ 13. This is what the learned trial judge said at p 23C–F:

> The fact that the accused was carrying (the plastic bag) with its contents followed by the speed at which he ran and threw it upon being confronted show that there is a clear nexus between his conduct and the offence in question. He wanted to part possession with what constituted the offence. It is a clear indication of his guilty mind. This is sufficient to infer that the accused had knowledge of the existence of the dangerous drugs in (the plastic bag)... The inference drawn in this case that the accused had knowledge of the existence of the dangerous drugs does not suggest that he knew that it was cannabis. With regard to the extent and nature of knowledge of the dangerous drugs that the prosecution must prove, I consider it necessary to reproduce what I had said in *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* at pp 420–421.

[4] There follows the passage reproduced from, *Public Prosecutor v Mohd Farid bin Mohd Sukis & Anor* [2002] 3 MLJ 401, in which the learned trial judge began by saying, 'It must be observed that in proving this element (of knowledge) the obligation of the prosecution is only to establish that the accused had knowledge ... of the existence of the dangerous drug but not its qualities'. He then quoted a passage from the Singapore case of *Sim Teck Ho v Public Prosecutor* [2000] 4 SLR 39, at pp 42–43, where Yong Pung How CJ after quoting a passage from the speech of Lord Pearce in *Warner v Metropolitan Police Commissioner* [1969] 2 AC 256, at p 305, concluded that, as regards knowledge, proof of possession requires proof of 'knowledge of the existence of the thing itself, that is the existence of the controlled drug, but not the name nor nature of the drug'.

[5] Then following the end of the passage reproduced from *Mohd Farid*, the learned trial judge said, 'Thus, it is not necessary for the prosecution to prove that the accused had knowledge of the nature of the drugs. It follows that the inferences drawn from the direct evidence are sufficient to show that the accused had possession of the cannabis'.

[6] The grounds of judgment of the Court of Appeal are reported as *Reza Mohd Shah bin Ahmad Shah v Public Prosecutor* [2006] 2 MLJ 223; [2005] 4 CLJ 581. The Court of Appeal took the view that the prosecution had to prove knowledge of the particular drug in question, that is cannabis, and said at p 585d–e that 'the issue is whether the appellant had the knowledge that he was carrying cannabis'. The Court of Appeal arrived at the following conclusion at p 587g–h:

> But in our view, just because the appellant took flight and threw the plastic bag containing dangerous drug does not point to one and only conclusion that he knew what he was carrying was the dangerous drug, cannabis. In the

circumstances, other inferences can be made such as that he did so because he may be carrying any other prohibited goods other than cannabis or that he was panicky and therefore chose to run away and throw out the bag he was carrying more so, in this case, when the police who confronted him were not in uniform.

[7] The Court of Appeal therefore found that the prosecution had failed to prove actual knowledge but the court had recourse to the presumption of knowledge in s 37(d) and found the respondent guilty of possession under s 6 of the Act. Recourse being had to the presumption in s 37(d), it was not possible, because of *Muhammed bin Hassan*, to also have recourse to the presumption of trafficking in s 37(da).

[8] There are two aspects to the judgment of the Court of Appeal as regards knowledge. The first aspect is regarding the type or extent of knowledge that is required for proof of possession. To the Court of Appeal it must be knowledge of the particular drug in question, in this case cannabis. The learned DPP understood the learned trial judge to mean that the requisite knowledge need not be 'as to the exact nature or quality' of the drug, and maintained in this appeal that the learned trial judge was right. The second aspect is the view of the Court of Appeal that other inferences could be drawn from the respondent's act of running away and throwing the plastic bag than that he knew he was carrying cannabis, such as that he knew he was carrying some other prohibited goods or that he became panicky when confronted by men not in police uniform. To the learned DPP that was mere speculation on the part of the Court of Appeal. Learned counsel for the respondent's submission in this appeal has been confined to those two aspects.

[9] The second aspect can be disposed of briefly. I think it is fanciful to say that the respondent took flight and threw the plastic bag because he probably knew that he was carrying some other prohibited goods. In the absence of any indication to the contrary, the inference must be that he knew that he was carrying what he was in fact carrying, namely, a prohibited drug. It is also in my judgment fanciful to admit the probability that the appellant acted as he did because he became panicky when confronted with men not in police uniform. If he had thought that they were, say, robbers pretending to be police officers in order to rob him of his belongings, he would have fled *without* throwing the plastic bag.

[10] As regards the first aspect, learned counsel for the respondent submitted that this appeal by the public prosecutor revolved around the following 'narrow question of legal interpretation' which he framed in his written submission:

For a court to find an accused guilty for possession of dangerous drugs ie 'actual possession' as understood in criminal law without the aid of the statutory presumption under s 37(d) of 'deemed possession', must the prosecution prove beyond a reasonable doubt that the accused had knowledge of the nature of the dangerous drugs (in addition to having knowledge of the existence of the dangerous drugs)?

[11] The question obviously arose from the learned trial judge's finding that with proof that the respondent had knowledge that there existed dangerous drugs in the plastic bag, the prosecution did not also have to prove that the respondent had knowledge of the 'nature' of the drugs. Obviously, in framing the question, the learned trial judge was construed as saying that to prove possession it is not necessary to prove knowledge of the 'nature' of the thing possessed. But it is clear to me, after considering as a whole all that the learned trial judge said on the question of knowledge, as I have set out, including what was said by him and by Yong Pung How CJ in the passage reproduced from *Mohd Farid*, that was not what the learned trial judge meant. What he meant was that with proof of knowledge that what was in the plastic bag were dangerous drugs, the prosecution did not also have to prove that the respondent knew what type of dangerous drugs they were or their name or exact qualities. That was what he meant by the 'nature' that the prosecution did not have to prove knowledge of. He did not mean to say that the prosecution did not have to prove knowledge of the 'nature' of the drugs *as dangerous drugs.* That he did find the prosecution had proved when he spoke of knowledge of the existence of dangerous drugs in the plastic bag. He meant that the respondent knew that there were dangerous drugs in the plastic bag or, in other words, that the respondent knew that what the plastic bag contained were dangerous drugs. That was what the learned trial judge meant when he said that the respondent 'wanted to part possession with what constituted the offence' and that it was 'a clear indication of his guilty mind'. The respondent had a guilty mind because he knew that he had dangerous drugs in his possession.

[12] To the learned trial judge, therefore, for the prosecution to prove that the respondent was in possession of cannabis the prosecution need only prove, as regards knowledge, that the respondent had knowledge that what he was carrying were dangerous drugs. The prosecution did not also have to prove that he knew that the dangerous drugs were cannabis. Therefore once knowledge that the thing carried was dangerous drugs was proved, possession of the particular drug, that is cannabis, was proved. That was why the learned trial judge, while saying that proof by inference 'that the accused had knowledge of the existence of the dangerous drugs does not suggest that he

knew that it was cannabis', nevertheless concluded 'that the inferences drawn from the direct evidence are sufficient to show that the accused had possession of the cannabis'.

[13] I am sure that the learned trial judge was not unaware of the authorities, such as those that I will be mentioning later, that say that possession in criminal law requires knowledge of the nature of the thing possessed and that he was not disagreeing with those authorities. In *Mohd Farid*, after the passage reproduced in his judgment in the present case, he had said, at p 421H–I, in reference to *Director of Public Prosecutions v Wishart Brooks* [1974] AC 862 and *Neo Koon Cheo v R* [1959] MLJ 47, 'Both these cases support the proposition that knowledge of the nature of the drugs possessed can be inferred from the circumstances of the case'. He was speaking of proof by inference of knowledge of 'the nature of the drugs possessed'. I think it is a matter of his understanding of what is meant by 'nature of the drugs possessed'. When he said in the present case that the prosecution did not have to prove knowledge of the nature of the drugs he must have said it on a view of 'nature' as meaning name or type or exact qualities. But if 'nature' means nature as a dangerous drug, then, when he said that the accused had knowledge of the existence of the dangerous drugs, which I understand to mean that the accused knew that there were dangerous drugs in the plastic bag, the learned trial judge must be taken to be saying, consistently with the authorities, that the prosecution did have to prove, and did prove, knowledge of the nature of the dangerous drugs, but nature as dangerous drugs.

[14] The 'question of legal interpretation' that learned counsel for the respondent posed is that of the meaning of the word 'nature' in s 37(d). As to why the meaning of a word in a statutory provision is relevant in this case that does not rely on the provision, this became clear as oral submission progressed. The respondent's counsel contended that 'nature' in s 37(d) means the particular type or name of the dangerous drug. On that basis he argued that to prove actual possession in a case that does not rely on the presumption in s 37(d), it must be proved that the accused knew the name or type of the dangerous drug concerned — as being knowledge of the 'nature' of the drug — because if it were not so, the burden of proving possession in a case that does not rely on the presumption would be lower than that in a case that does. This is a fallacious argument. Even if, in a case that does not rely on the presumption, the knowledge that is necessary to be proven as knowledge of the nature of the drug is knowledge as to the name or actual type of the drug, the burden on the prosecution in a case that relies on the presumption will always be lower, because in such a case all that the prosecution would need to prove is custody or control of the thing containing the dangerous drug.

[15] Learned counsel for the respondent submitted that the Dangerous Drugs Act 1952 being a penal statute, it should be construed strictly, and if there is any ambiguity in the meaning of the word 'nature' in s 37(d), the construction that is in favour of the accused should be favoured. But he did not cite any authorities on the meaning of the word 'nature' in s 37(d), probably because there are none. Instead he cited the following five authorities.

[16] In *Tan Teck Chew v Public Prosecutor* [2002] 2 MLJ 321, KC Vohrah JCA said in the Court of Appeal, at p 324G–H, 'There was of course no finding of knowledge of heroin in the bag. The trial judge had to rely on s 37(d) ... to infer as a presumption that he knew of the nature of the heroin', and, at p 326H–I, he spoke of the appellant failing to rebut the presumption in s 37(d) 'that he knew that what was contained in the bag was heroin'. That case cannot, by those statements, be taken as authority for contending that 'nature' in s 37(d) means the particular type or name of the dangerous drug because the question of the meaning of 'nature' did not arise in that case. Since the dangerous drug that was the subject of the charge in that case was heroin it was natural to speak of knowledge as knowledge as to heroin. The same may be said of *Taib bin Mohamad v Public Prosecutor* [2002] 3 MLJ 476 where KC Vohrah JCA said in the Court of Appeal, at p 480H–I, '... the judge should only have called the accused to make his defence on the charge of the possession of the cannabis based on the presumption under s 37(d) ... that he knew that (sic) nature of the drug ...', and, at p 481H–I, '... his defence ... did not rebut the presumption of knowledge under s 37(d) ... that he knew the nature of the material he was carrying was cannabis'.

[17] In *Chan Pean Leon v Public Prosecutor* [1956] MLJ 237, the charge was of assisting in carrying on a public lottery and the question of possession concerned certain counterfoils. The case did not concern any statutory presumption of possession. Speaking of the mens rea aspect of possession, Thomson J at p 239 (upper right), said, '... it is necessary to prove that the person in possession knows the nature of the thing possessed' and added, as an example, 'If ... it was a lottery document it must be proved that he knew it was a lottery document'. The latter statement cannot be taken as authority for the proposition that in a drug case possession requires proof of knowledge of the particular drug in respect of which the accused is charged. That is because the statement does not involve the idea of a particular type of lottery document. Lottery document was spoken of as a general class, like dangerous drug. Applied to dangerous drug, that statement becomes 'If ... it was a dangerous drug, it must be proved that he knew it was a dangerous drug', and not the type or name of the particular dangerous drug as well.

[18] A similar situation is to be found in *Toh Ah Loh and Mak Thim v Rex* [1949] MLJ 54. It was a case of possession of ammunition in ammunition boxes. Gordon-Smith Ag CJ said at p 55 that in order for possession to incriminate, the possessor 'must know the nature of the thing possessed' and that as regards the accused in that case the jury must be satisfied that 'he knew the boxes contained ammunition'. The case concerned ammunition as a general class and not any particular type of ammunition.

[19] Of the five cases relied on by learned counsel for the respondent in support of his contention that 'nature' in s 37(d) means the particular name or type of the dangerous drug concerned, *Toh Su Kuan v Public Prosecutor* [2005] 3 CLJ 740, a drug case, is the only case which may be understood to rule that knowledge of the nature of the thing possessed must be exact or specific knowledge. In that case the prosecution did not rely on s 37(d) but sought to prove possession by evidence. The accused was found to carry 356 packets of heroin concealed at various parts of his body. The learned trial judge held that the manner in which the packets were concealed indicated knowledge that the packets contained heroin. On appeal it was submitted on behalf of the accused that from the manner in which the packets were concealed the accused might be taken to have known that he was carrying some illicit substance but not its precise nature. The Court of Appeal agreed and held that the accused ought not to have been called to enter upon his defence. The Court of Appeal said, at p 746:

> In our judgment, the manner in which the packets were fastened to the appellant's person shows at the highest that he had knowledge the packets contained some prohibited substance, perhaps, drugs or perhaps some other substance which was unlawful to have in one's possession. But it certainly does not prove that the appellant knew that the packets contained heroin, the drug which forms the subject matter of the charge. It follows from what we have said thus far that from the totality of the evidence led by the prosecution that the vital ingredient of mens rea possession required by s 37(da)(i) had not been established. On that ground alone the learned judge ought not to have called the appellant to enter upon his defence. And this is a case where the learned deputy took the position that this was either a case of actual trafficking or no offence.

That decision was relied on by the Court of Appeal in the present case.

[20] The learned DPP informed us that the public prosecutor's appeal against that decision had been withdrawn because the warrant of arrest against the accused, who had been released following his success in the Court of Appeal, could not be executed. In my judgment, the decision was, with respect, an erroneous decision. Nik Hashim FCJ has also said so quite recently in *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19.

[21] In my judgment, where possession of a dangerous drug is concerned, to prove the element of guilty knowledge or mens rea the prosecution need only prove that the accused knew the *nature* of the particular dangerous drug that he was in possession of *as a dangerous or prohibited drug*. The prosecution need not also prove knowledge as to the name, type or exact qualities of the dangerous drug. When the authorities say that for proof of possession in criminal law it is necessary to prove that the possessor knew the nature of the thing possessed, they mean knowledge of what the thing essentially or basically is. I share the view of Taylor J who said in *Leow Nghee Lim v Reg* [1956] MLJ 28, at p 31 (upper left), 'Without at least general knowledge there cannot be possession but there can be possession without full and exact knowledge'.

[22] Not only is that, to my mind, a fair and just construction of what is meant by knowledge of the nature of the thing possessed, but were the meaning to be as may be inferred from the decision in *Toh Su Kuan*, in cases of trafficking in a dangerous drug where the prosecution seek to rely on the presumption of trafficking by reason of possession of the requisite amount of the drug, such as the present and many other cases that are likely to arise, where guilty knowledge can only be inferred from circumstances, the accused will always be acquitted without their defence being called because it will always be argued that while the circumstances show that they knew they had in their possession a dangerous drug, the circumstances do not show beyond reasonable doubt that they knew what type of drug it was or its name or exact qualities, and it would be virtually impossible to defeat the argument. In my judgment, therefore, the Court of Appeal erred in holding that the prosecution had to prove that the respondent knew that what he was carrying was actually cannabis.

[23] As to the meaning of 'nature' in s 37(d), I do not think it really matters what the extent of the meaning is, because the presumption is rebuttable. The moment custody or control of the thing containing the dangerous drug is established, knowledge of the nature of the drug is presumed. If nature means only nature as a dangerous drug, the accused is entitled to prove, if he can, that he did not know that the contents of the thing he was in custody or control of were a dangerous drug. If, as contended by learned counsel for the respondent, nature means only the name, type or exact qualities of the dangerous drug, or if it means also that besides nature as a dangerous drug, the accused is still entitled to prove, if he can, that he did not know that the contents of the thing that he was in custody or control of were a dangerous drug and it would inevitably follow that he did not know the name, type or exact qualities of the dangerous drug.

A **[24]** For the reasons that I have given I would allow the appeal, set aside the orders of the Court of Appeal and confirm the conviction and sentence by the High Court.

Hashim Yusoff FCJ:

B

[25] The respondent was convicted and sentenced to death by the High Court for an offence of trafficking 795.3g of cannabis. On appeal, the Court of Appeal substituted the conviction under s 39B(2) of the Act with one under s 6 of the Act and imposed a sentence of 18 years imprisonment with effect from his date of arrest ie 14 August 2000, plus the minimum of ten strokes of whipping under s 39A(2) of the Act. The public prosecutor is now appealing against the decision of the Court of Appeal.

C

D

[26] The brief facts are quite straight forward. The respondent was seen by Inspector Mohamad Alpiyang bin Ali ('PW2') carrying in his right hand exh P3 ('P3'), a plastic bag for some distance. When PW2 shouted 'police', the respondent immediately ran and was seen throwing exh P3 away. Upon recovery of exh P3 by PW2, it was found to contain the offending 795.3g of cannabis.

E

[27] The crux of this appeal revolves on the issue whether the accused/respondent, without the aid of the statutory presumption under s 37(d) of the Act of 'deemed possession' had knowledge of the nature of the dangerous drugs.

F

[28] The learned DPP submitted that the Court of Appeal was of the view that just because the respondent took flight and threw the plastic bag containing the dangerous drugs did not point to the one and only conclusion that he knew what he was carrying was the dangerous drug, cannabis. In the circumstances, other inferences can be made such as that he did so because he may be carrying any other prohibited goods other than cannabis or that he was panicky and therefore chose to run away and throw away the bag he was carrying more so, in this case, when the police who confronted him were not in uniform (see para 11 of the grounds of judgment of the Court of Appeal).

G

H

I **[29]** It is the learned DPP's submission that the prosecution is not relying on s 37(d) of the Act for the presumption of knowledge against the respondent. The prosecution is basing its case simply on the conduct of the respondent which offers no other explanation but that he knew he was carrying dangerous drugs.

[30] Learned counsel for the respondent however submitted that the trial judge found that 'it is not necessary for the prosecution to prove that the accused had knowledge of the nature of the drugs. It follows that the inferences drawn from the direct evidence are sufficient to show that the accused had possession of the cannabis' (see pp 22–23 of the appeal record). He then referred to several local authorities which have interpreted that 'actual possession' requires proof that the possessor must have known the nature of the drug which was being carried (see *Tan Teck Chew v PP* [2002] 2 MLJ 321; *Taib bin Mohamed v PP* [2002] 3 MLJ 476, at pp 480–481 and *Toh Su Kuan v Public Prosecutor* [2005] 3 CLJ 740, at pp 744–745.

[31] In the instant appeal, the learned trial judge had said in his grounds of judgment (at p 11 of the appeal record) that, relying on the case of *Public Prosecutor v Phua Keng Tong* [1986] 2 MLJ 279, as proof of knowledge is very often a matter of inference, the conduct of the respondent prior to his arrest is brought into sharp focus. The fact that the accused was carrying exh P3 with its contents followed by the speed at which he ran and threw it upon being confronted by the police, show that there is a clear nexus between his conduct and the offence in question ie that he wanted to part possession with what constituted the offence. It is a clear indication of his guilty mind. This is sufficient to infer that the accused had knowledge of the existence of the dangerous drugs in exh P3. I agree with the learned trial judge on this point.

[32] In the case of *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356, the appellant was tried on a charge that he had in his possession a substance specified in the schedule to the Drugs (Prevention of Misuse) Act 1964 namely 20,000 tablets containing amphetamine sulphate. Lord Reid at p 367, had this to say: 'Further it would be pedantic to hold that it must be shown that the accused knew precisely which drugs he had in his possession. Ignorance of the law is no defence and in fact virtually everyone knows that there are prohibited drugs. So it would be quite sufficient to prove facts from which it would properly be inferred that the accused knew that he had a prohibited drug in his possession'.

[33] The case of *Abdullah Zawawi bin Yusof v Public Prosecutor* [1993] 3 MLJ 1 is distinguishable because in that case the appellant took to his heels as soon as he had heard DPC Mohd Hashim's announcement of the discovery of the wooden box containing a plastic bag wherein the cannabis was found. In the instant appeal, the respondent already threw the plastic bag (P3) away even before its cannabis contents were discovered by the police.

[34] I am also unable to agree with the Court of Appeal on its finding that on the facts of this case, that it could not be inferred the respondent did have the knowledge that what he possessed was the dangerous drug, cannabis for

reasons as stated earlier above. Clearly on the evidence before the trial judge, the respondent was in possession and having custody and control of the plastic bag which contained the cannabis. His running away and throwing away the plastic bag (P3) are the overt acts from which the learned trial judge had correctly inferred that the respondent knew the nature of the contents of the said plastic bag (P3) to be cannabis. The learned trial judge also came to the conclusion that the respondent's defence was in the nature of a bare denial and doubted the credibility of his evidence that he was not carrying exh P3. As such he was unable to accept the defence advanced by the respondent that PW2 was not at the scene as PW2 was cross-examined at length on the basis that he was at the scene.

[35] The learned trial judge had appropriately considered the defence and gave his reasons why he had rejected it. The statutory presumption of trafficking under s 37(da) is applicable in this case as the amount of cannabis is more than 200g in weight. The respondent was also held by the trial judge to have failed to rebut the said presumption against him and that the prosecution had proved its case, beyond reasonable doubt.

[36] On the evidence available in this case I am of the view that the Court of Appeal had erred in disturbing the findings of facts by the trial judge. For the reasons adumbrated above, I therefore allow this appeal and set aside the order of the Court of Appeal and restore the conviction and sentence imposed by the High Court.

Appeal allowed. Court of Appeal order set aside. High Court's conviction and sentence affirmed.

Reported by K Nesan